BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID L. SPONSEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,360
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS	)	
INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

The application of respondent for review by the Workers Compensation Appeals Board of an Award by Administrative Law Judge Kenneth S. Johnson dated February 11, 1998, came on for consideration by the Appeals Board.

APPEARANCES

Claimant appeared by and through his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Shirla R. McQueen of Liberal, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Should claimant be denied workers compensation benefits due to claimant's refusal to submit to reasonable medical treatment in violation of K.A.R. 51-9-5?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant suffered accidental injury during the period December 1, 1995, through March 19, 1997, developing carpal tunnel syndrome bilaterally while running a Kryovac machine for respondent. The Kryovac operator's job required hand intensive repetitive work. Over the course of time, claimant began developing pain in his hands, forearms, and up to his elbows.

Claimant underwent conservative treatment with several doctors including Dr. E. Estrada, Dr. Harrison, Dr. Edwards, Dr. J. E. Harrington, Dr. Ernest R. Schlachter and Dr. C. Reiff Brown. It was ultimately discovered that claimant needed additional treatment and he came under the treatment of both Dr. Marc-Andre Bergeron and Dr. Pedro A. Murati.

At one point, Dr. Bergeron suggested surgery. However, claimant declined surgery as he feared that his condition would be made worse by the surgery rather than better. Apparently claimant had talked to coworkers suffering from the same problem who had less than desirable results from the surgery.

Claimant has since returned to work with respondent at a comparable wage driving a forklift. The Administrative Law Judge granted claimant a 12 percent permanent partial impairment of function to the body as a whole based upon the opinions of Dr. Murati and of Dr. C. Reiff Brown, an independent medical examining physician. This functional rating is not contested by the parties and is adopted by the Appeals Board as appropriate.

Respondent does raise issue with claimant's refusal to submit to the carpal tunnel surgery contending benefits should be denied. K.A.R. 51-9-5 states:

> An unreasonable refusal of the employee to submit to medical or surgical treatment, where the danger to life would be small and the probabilities of a permanent cure great, will justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation but only after a hearing as to the reasonableness of such refusal.
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> The penalty provided for the refusal to submit to an examination will be rigidly enforced. There shall be the utmost co-operation between the parties throughout to ascertain the true facts.

Dr Murati, Dr. Bergeron, and Dr. Brown were all deposed in this matter and questioned at length regarding claimant's decision to forego the surgery. Dr. Murati stated

that claimant needed the surgery, it would be the best thing for him, and normally patients submit to this kind of surgery. Dr. Murati did admit that there are risks associated with surgery as is always the case. However, the risks were extremely small in his opinion in proportion to the benefit expected from the surgery. Dr. Murati admitted that the best treatment would be to remove claimant from the aggravating activities of repetitive work. This could result in an improvement in claimant's condition without the need for the invasive surgery. At the time of the regular hearing, claimant had been removed from the repetitive Kryovac activities and was driving a forklift.

Both Dr. Bergeron and Dr. Brown agree that the risks associated with this type of surgery were extremely small. They did acknowledge that the potential risks included additional pain, nerve damage, reactions to medication, infection, and in extremely rare cases, death. They all acknowledged that it must be claimant's decision regarding whether to undergo the surgery although Dr. Bergeron testified that most patients submitted to the surgical treatment.

Dr. Brown opined that in 80 to 85 percent of the cases, the claimant's chances of a complete recovery were very good. He estimated in this case claimant's functional impairment would be reduced by 50 percent from 12 percent to 6 percent to the body after the surgery. He did acknowledge that in 10 to 15 percent of the cases, the benefit was only partial and in up to 5 percent of the cases there was either no benefit or a worsening of the conditions subsequent to the surgery.

The Appeals Board has been presented with this issue in the past. In Weaver v. Warner Manufacturing Company, Inc., Docket No. 187,468 (December 1995), the Appeals Board found that a claimant who refused to undergo a second carpal tunnel surgery, did not make an unreasonable choice considering the fact that claimant's first surgery had only temporarily alleviated her symptoms. In Weaver, the treating physician opined that the claimant's decision to forego the second surgery was reasonable under the circumstances.

K.A.R. 51-9-5 is in sync with Larson's Workers' Compensation Law, § 13.22(b), which states that when there is a refusal of treatment, whether this refusal should be a bar to compensation turns on a determination of whether the refusal is reasonable. Reasonableness requires a weighing of the probability of the treatment successfully reducing the disability by a significant amount versus the risk of the treatment to the claimant. Larson's does acknowledge that, if the risk is insubstantial and the probability of the cure high, the refusal would result in termination of benefits. The Kansas Supreme Court in Morgan v. Sholom Drilling Co., 199 Kan 156, 427 P.2d 448 (1967), held that a workman's refusal to undergo back surgery, which would leave the worker with a 10 percent residual disability and where the chance of a successful operation was not more than 90 percent, was reasonable when considering the risks attendant to a major operation. In this instance, it is acknowledged by the doctors the risk to claimant is very slight. However, as is always the case, there are risks associated with surgery. Any time an invasion is made of the human body, the risk of infection, nerve damage, and worsening

of a condition exists. In addition, Dr. Brown was willing to opine that claimant's functional impairment would only be reduced by 50 percent and, therefore, the surgery does not constitute a permanent cure as contemplated by K.A.R. 51-9-5. Finally, the Appeals Board considers the fact that an acceptable form of treatment for carpal tunnel syndrome short of surgery is to eliminate or remove the aggravating factor, in this instance, the repetitive trauma. As claimant has returned to work with respondent as a forklift driver and is no longer working the repetitive Kryovac job, the Appeals Board considers this to be an appropriate method of attempting to treat claimant's ongoing condition and at the same time avoid the necessity of surgery.

The Appeals Board, therefore, finds that claimant's decision to forego the surgery in this instance does not constitute an unreasonable refusal to submit to medical treatment and benefits pursuant to K.A.R. 51-9-5 should not be denied or terminated.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth S. Johnson dated February 11, 1998, should be, and is hereby, affirmed and the claimant, David L. Sponsel, is granted an Award against the respondent, National Beef Packing Company and its insurance carrier, Wausau Underwriters Insurance Companies, for an accidental injury arising out of and in the course of his employment through March 19, 1997.

Claimant is entitled to 49.8 weeks permanent partial disability compensation at the rate of $263.84 per week based upon an average weekly wage of $395.74 for a 12% permanent partial general disability making a total award of $13,139.23.

As of May 7, 1998, the entire award would be due and owing and ordered paid in one lump sum minus any amounts previously paid.

Future medical is awarded upon proper application to and approval by the Director.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Underwood & Shane	
Transcript of Proceedings	$153.50
Owens, Brake, Cowan & Associates	
Deposition of C. Reiff Brown, M.D.	$114.46

Alexander Reporting Co.
Deposition of Dr. Murati $110.30

Susan Maier
Deposition of Dr. Bergeron Unknown

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Shirla R. McQueen, Liberal, KS
Pamela J. Fuller, Administrative Law Judge, Garden City, KS
Philip S. Harness, Director